

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

February 23, 2006 Session

**IN RE: M.B., S.C., C.C., N.D.C., AND A.C.**

**Appeal from the Juvenile Court for Sumner County  
No. 71-107, 71-289 Barry Brown, Judge**

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**No. M2005-02120-COA-R3-PT - Filed April 25, 2006**

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Mother appeals the Sumner County Juvenile Court's order terminating her parental rights to five children, M.B., S.C., C.C., N.D.C., and A.C., based on abandonment and persistent unremedied conditions. S.C., C.C., N.D.C., and A.C.'s father voluntarily relinquished his parental rights and thus, was not a party to the petition for termination. M.B.'s father does not challenge the trial court's termination of his parental rights. The judgment of the trial court is reversed in part and affirmed in part.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed in Part,  
Affirmed in Part**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Bruce N. Oldham, Gallatin, Tennessee, for the appellant, Bonnie Cheatham.

Paul G. Summers, Attorney General and Reporter; Elizabeth C. Driver, Assistant Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

This case concerns the termination of B.C.'s ("Mother") parental rights to five children, M.B., S.C., C.C., N.D.C., and A.C., ranging in age from ten (10) to four (4) years old. S.C., C.C., N.D.C., and A.C. were born from the marriage of Mother and S.C. S.C. voluntarily relinquished his parental rights on July 23, 2004, and thus, was not a party to the petition for termination. M.B.'s father, M.E., was a party to the petition for termination, however, he does not appeal the trial court's termination of his parental rights.

On June 25, 2003, Child Protective Services (“CPS”) conducted an investigation, which revealed that S.C. had been physically abusive to Mother and to the children. However, the State had been extensively involved with the family prior to this time, including eight (8) other CPS investigations. As a result of the physical abuse, the Department of Children’s Services (“DCS”) instituted a safety plan and the next day, S.C. left the marital home. Without the financial support from the household’s sole provider, Mother was evicted. Mother thereafter voluntarily placed the custody of her four eldest children with DCS. However, Mother placed the youngest child, A.C., with S.C.

A.C. was later removed from S.C.’s care and placed with his maternal grandmother with the understanding that contact with Mother be supervised. DCS case manager, Ms. Sharee Gould (“Ms. Gould”), visited the home and witnessed A.C. crawling unsupervised on a dirty floor, wearing only a soaked diaper. He appeared to have a bruise under one eye and a cut under the other. It was later revealed that Mother had kept A.C. while maternal grandmother was working and then lied to DCS about it, thereby violating the supervised contact requirement. At that point, DCS took A.C. into custody and filed a dependency and neglect petition on behalf of all five children.

The juvenile court entered a protective custody order on June 27, 2003. At a hearing on August 8, 2003, the children were adjudicated dependent and neglected by agreement. The children were then placed with foster parents, Mr. Tracy Patton and Mrs. Rhonda Patton (“the Pattons”). The Pattons have indicated a possible interest in adopting the children if the Court affirms the termination of Mother’s parental rights. Mrs. Patton testified that all the children have special needs.

On August 25, 2003, Mother was evaluated by Dr. Victor Pestrak (“Dr. Pestrak”), a licensed psychologist. Dr. Pestrak found no indication of thought disorder, depression, significant anxiety, or substance abuse. However, he determined that Mother was easily overwhelmed by stress, personal responsibility, and challenges in life. Dr. Pestrak indicated that Mother was extremely immature, with a strong preference to be taken care of rather than to care for others. Her judgment was poor and she lacked empathy and personal responsibility. The evaluation results suggested that Mother’s needs tended to come before other’s needs, including the needs of her children. During Mother’s evaluation, Dr. Pestrak administered the Child Abuse Potential Scale, which revealed that Mother shared a number of traits known and associated with child neglect and abuse. Dr. Pestrak cautioned that individuals with these characteristics have little ability to make significant progress through counseling due to an unwillingness to admit to problems and to take responsibility for problems.

Mother also engaged in counseling through the Mental Health Cooperative from June 26, 2000 until February 19, 2004. On her intake, she was diagnosed with depression. Mr. John Barker, Mother’s case worker, testified that Mother’s attendance was regular and that she was compliant. However, Mother was discharged when S.C. placed her on a private insurance policy because the Mental Health Cooperative only accepts TennCare patients.

Ms. Sandra Bass (“Ms. Bass”), a supervisor with Mid-Cumberland Human Resource Agency, Homemaker Services (“Homemaker Services”), began working with Mother in 2003, prior to the time Mother voluntarily placed the children with D.C.S. Ms. Bass worked with Mother on achieving various goals such as keeping the home clean and organized, budgeting, parenting skills, obtaining employment, and acquiring public housing. Ms. Bass indicated that Mother had five different residences during the year-and-a-half that they worked together. Although Mother was pleasant and cooperative, Ms. Bass thought that Mother did not always follow through with tasks and was untruthful on several occasions. Homemaker Services closed the case in June, 2004, due to Mother’s noncompliance and her failure to meet any of the goals which had been set out by the agency.

Mother also participated in therapeutic visitation with the children from June, 2003 until October, 2004 through Residential Services, Inc. (“RSI”). Therapeutic Visitation Services, a division of RSI, is designed to work with parents during visitation in order to teach parenting skills, such as appropriate discipline, so that families can be reunited. Although RSI typically works with a family anywhere from six (6) to nine (9) months, RSI staff continued therapeutic visitation with Mother for well over a year. RSI staff member, Ms. Mindy Feuerborn (“Ms. Feuerborn”), testified that the length of their involvement was due to Mother’s failure to make any good headway. She stated that Mother was inconsistent and untruthful, failed to secure permanent and stable housing or employment, exercised poor judgment, and missed scheduled visits with the children.

In January, 2004, Ms. Jennifer Maulden (“Ms. Maulden”) replaced Ms. Gould as Mother’s DCS case manager. Evidently, Ms. Feuerborn had incurred substantial obstacles in setting up therapeutic visits for Mother and the children. Ms. Feuerborn testified that Ms. Gould and the Pattons were not helpful in facilitating visitation and appeared to be purposefully obstructing work toward reunification. Ms. Feuerborn also stated that Ms. Gould had voiced specific objections to reunification. However, after Ms. Feuerborn conveyed her concerns at a meeting in October, 2003, the parties reached an understanding and achieved an atmosphere of cooperation. There were no allegations of obstruction of visitation once Ms. Maulden became Mother’s case worker.

In February, 2004, Ms. Maulden planned an unsupervised weekend visit with the children. Because Mother was without transportation or a driver’s license at the time, DCS requested a copy of the driver’s license and proof of insurance of Mother’s brother- and sister-in-law, who had volunteered to drive the children. However, the visit never took place because Mother failed to supply the requested proof of license and insurance. Mother thereafter moved in with her father, a recovering alcoholic, with whom she had had a tumultuous relationship in the past. RSI staff indicated that it was after this time that Mother’s progress deteriorated.

During one home visit, Mother’s father was intoxicated and yelled profanities in front of the children. The visit was abruptly ended. Soon after this event, Mother requested that RSI help her pay the rent so that the family would not be evicted. RSI agreed to do so, but explained that they could only provide such assistance once and then Mother would be expected to get back on her feet. Despite RSI’s warning, the following month, the family was evicted.

In the summer of 2004, Mother disappeared, calling Ms. Maulden to state that her grandmother had passed away and that she was in California. In reality, Mother was at a hotel in Illinois with a boyfriend. When confronted with her dishonesty, Mother explained that she had left the state because an arrest warrant had been issued due to her failure to appear for charges related to driving on a suspended license. She later returned to Tennessee and was placed in jail for several weeks.

In August, 2003, Mother was diagnosed with pre-cancerous fibroid tumors. She underwent a hysterectomy on April 20, 2004. Mother testified that she was also anemic, which impaired her normal routine and her ability to maintain stable employment. She stated that there were days when she could not get out of bed due to her low blood count.

By September, 2004, Ms. Maulden concluded that despite RSI's continued involvement, Mother was not close to being able to parent the children. Ms. Maulden's conclusion was based on Mother's failure to submit a budget, to provide consistent monthly pay stubs, to secure transportation, to comply with therapy requirements, to obtain adequate housing for the children, and to be open and honest with DCS. DCS filed a petition to terminate Mother's parental rights on September 10, 2004. In December, 2004, the court suspended Mother's visitation rights based on the recommendation of Ms. Carolyn Bailes, counselor for M.B., S.C., and C.C., who determined that continued contact would be harmful to the children.

One week prior to the last day of trial, Mother moved into a two-bedroom house and signed a one-year lease. At this time, she had been working for Gourmet Pizza for eight months. She did not have a driver's license but intended to transport the children through TennCare services and family and friends. Based on these facts, the trial court terminated Mother's parental rights due to abandonment and persistent unremedied conditions. The court also found that termination was in the best interests of the children.

On appeal, Mother challenges the trial court's termination of her parental rights. She asserts that the evidence does not support a finding by clear and convincing evidence that (1) her parental rights be terminated for willful non-payment of support; (2) her parental rights be terminated for persistent conditions; and, (3) the termination of her rights are in the best interests of the children.

## **II. Burden of Proof**

Before proceeding to Mother's issues on appeal, we review the well-defined standards of review applicable to parental termination cases. Both the United States and the Tennessee Constitutions have been interpreted to provide parents with the fundamental right to the care, custody, and control of their children. *Santosky v. Kramer*, 455 U.S. 745, 754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Keisling v. Keisling*, 92 S.W.3d 374, 378 (Tenn.2002). Although this right is fundamental, it is not absolute, and states may interfere with parental rights upon the showing of a compelling state interest. *Santosky*, 455 U.S. at 747. The grounds in which the state's interest in the welfare of the child justifies parental termination is set forth in Tennessee Code Annotated,

section 36-1-113(g). In order to terminate parental rights, the state must prove the existence of one of the statutory grounds by clear and convincing evidence and that termination is in the children's best interests. *Santosky*, 455 U.S. at 769-70; *In re Valentine*, 79 S.W.3d 539, 546 (Tenn.2002).

This Court attempted to describe the clear and convincing evidence standard, explaining that although it does not require as much certainty as the "beyond a reasonable doubt" standard, the "clear and convincing evidence" standard is more exacting than the "preponderance of the evidence" standard. *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn.Ct.App.1995). In order to be clear and convincing, the evidence must eliminate any serious doubt as to the correctness of the conclusions to be drawn from the evidence. *O'Daniel*, 905 S.W.2d at 188. Such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. *O'Daniel*, 905 S.W.2d at 188. In the present case, therefore, subject to a best interest finding, this Court must affirm the trial court's decision to terminate Mother's parental rights if the record contains clear and convincing evidence to support any of the statutory grounds found by the trial court. See *In re M.C.G.*, 1999 WL 332729, No. 01A01-9809-JV-00461, at \*5 (Tenn.Ct.App. May 26, 1999).

### **III. Abandonment**

The first statutory ground at issue in this case is abandonment. In Tennessee, a court may terminate a parent's right to his or her children when a parent has abandoned the child as defined in Tennessee Code Annotated section 36-1-102 (1)(A). Tenn.Code Ann. § 36-1-113(g)(1). For the purposes of terminating Mother's parental rights, "abandonment" is defined as:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

Tennessee Code Annotated, section 36-1-102(1)(A)(I).

On December 3, 2003, the Juvenile Court of Sumner County ordered Mother to pay child support in the amount of \$10.00 per week, per child in state custody. It is undisputed that Mother failed to make a single payment of support since the time her four eldest children entered foster care on April 4, 2003. Mother asserts however, that her failure to pay was not "willful" because her inability to render financial support was involuntary. The court addressed the definition of willfulness in the context of abandonment in *In re Adoption of Muir*, 2003 WL 22794524, No. M2002-02963-COA-R3-CV, at \*5 (Tenn.Ct.App. Nov. 25, 2003).

"Willfulness" does not require the same standard of culpability required by the penal code. *G.T. v. Adoption of A.E.T.*, 725 So.2d 404, 409

(Fla.Dist.Ct.App.1999). Nor does it require malevolence or ill will. *In re Adoption of a Minor*, 343 Mass. 292, 178 N.E.2d 264, 267 (Mass.1961). Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. *In re Mazzeo*, 131 F.3d 295, 299 (2d Cir.1997); *United States v. Phillips*, 19 F.3d 1565, 1576 (11th Cir.1994); *In re Adoption of Earhart*, 117 Ohio App. 73, 190 N.E.2d 468, 470 (Ohio Ct.App.1961); *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 89, 96 (Idaho 1979). Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.

Failure to support a child is "willful" when a person is aware of his or her duty to support, has the capacity to provide the support, makes no attempt to provide support, and has no justifiable excuse for not providing the support. *Shorter v. Reeves*, 72 Ark.App. 71, 32 S.W.3d 758, 760 (Ark.Ct.App.2000); *In re B.S.R.*, 965 S.W.2d 444, 449 (Mo.Ct.App.1998); *In re Estate of Teaschenko*, 393 Pa.Super. 355, 574 A.2d 649, 652 (Pa.Super.Ct.1990); *In re Adoption of CCT*, 640 P.2d 73, 76 (Wyo.1982).

*In re Adoption of Muir*, 2003 WL 22794524, at \*5.

“While failure to support is a circumstance of abandonment, it must be judged in the light of ability to support, and other circumstances. So long as a parent is financially unable to render financial support, the failure to do so cannot be voluntary, hence cannot constitute abandonment.” *Pierce v. Bechtold*, 448 S.W.2d 425, 429 (Tenn.Ct.App.1969). The children in this case were voluntarily placed into DCS custody due to Mother’s recognized inability to maintain adequate housing for the children following S.C.’s decision to leave the marital home and cease any monetary contributions to the family. The trial court stated in its August 3, 2005, order terminating parental rights:

The temporary custody of [the children were] placed with the State of Tennessee, Department of Children’s Services by Defendant [Mother] pursuant to a voluntary placement agreement on April 4, 2003. The Court finds that the Defendant Mother made such arrangements out of the goodness of her heart and because she loved her children and was homeless at the time.

Furthermore, at the time the children were voluntarily placed with the State, Mother had not obtained her high school diploma and she had little work experience outside the home. Despite these obvious initial setbacks, the record shows that in the four (4) months prior to the petition for termination, May 10, 2004, until September 10, 2004, Mother was employed intermittently. On July 15, 2004, Mother was hired to drive vehicles to auction for Kelley Services. However, this job only lasted two weeks because her driver’s license was suspended due to her failure to pay a citation. In mid-August, Mother began working for Gourmet Pizza, where she earned \$6.50 per hour. Her payroll

records show that between August 17, 2004 and September 7, 2004, Mother received a total of \$667.71 from her employment.

It is well recognized that “[a] parent who fails to support a child because he or she is financially unable to do so is not willfully failing to support the child.” *In re Adoption of Muir*, 2003 WL 22794524, at \*5; *see O’Daniel*, 905 S.W.2d at 188; *Pierce*, 448 S.W.2d at 429. We cannot say that the State showed by clear and convincing evidence that Mother willfully failed to pay child support. The record clearly reflects that in the four (4) months prior to the petition for termination, Mother attempted to earn enough money to pay the court ordered child support. Despite her efforts, her hourly wage did not provide her with the capacity to support herself as well as to contribute \$200.00 a month in child support. We find that her failure to pay child support was involuntary and therefore did not constitute abandonment within the meaning of the statute.

#### **IV. Persistent Conditions**

The next issue on appeal is whether the State proved by clear and convincing evidence that Mother failed to remedy the persistent conditions which prevented the children’s return to her care. Pursuant to Tennessee Code Annotated, section 36-1-113(g)(3)(A), a court may terminate parental rights when:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

- (i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
- (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
- (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn.Code Ann., section § 36-1-113(g)(3)(A).

We must decide whether that State proved by clear and convincing evidence that the conditions which would cause the children to be subjected to further neglect still exist. On July 9, 2003, an initial permanency plan was developed by DCS. The plan required that Mother provide proof of legal and stable income, secure appropriate housing sufficient to meet her children’s needs,

participate with a therapist in order to gain skills and learn how to meet her children's needs while using appropriate discipline, show that she understands her mistakes, take responsibility for her contributions to the neglect of her children, and present a willingness to change. A second permanency plan was developed on March 2, 2004, which set out the conditions which needed to be remedied in order for Mother to regain custody of the children. The revised plan required that Mother secure adequate housing and transportation for the children, obtain her driver's license, provide DCS with a budget to show that she could provide for the children's needs, maintain employment for the financial needs of the children, become emotionally healthy, and maintain open and honest communication with DCS.

We believe that there was clear and convincing evidence presented at trial showing that Mother failed to remedy the persistent conditions listed in the July 9, 2003, and March 2, 2004, permanency plans. Mother obtained housing sufficient for the children only one week prior to the last day of trial, living in five or more residences during the time in which the children have been in custody. The record also shows that even when Mother maintained proper housing, she lived with individuals who were inappropriate for the children to be around. Although Mother maintained employment for approximately eight (8) months prior to trial, her income was incapable of providing for the children's needs. Mother also failed to obtain a driver's license and transportation despite the fact that all five of the children have special needs and thus require transportation to doctor's appointments, speech therapy, and counseling. Most importantly, the record amply supports the finding that Mother was simply overwhelmed by the children and unable to adequately care for them.

Mother contends however, that the trial court erred in terminating her parental rights because the unremedied persistent conditions are solely a result of her economic disadvantage. This Court addressed poverty in the context of unremedied persistent conditions in *In re Z.J.S.*, 2003 WL 21266854, No. M2002-02235-COA-R3-JV, at \*15 (Tenn.Ct.App. June 3, 2003), where the Court stated:

The Department, even with the best of its bureaucratic intentions, does not have the authority to remove children from their parents' custody simply because the parents are economically disadvantaged. There must be more because affluence is not the litmus test for appropriate parenting. A lack of wealth does not translate into a parent's inability to nurture, support, and provide for a child, just as having great wealth does not guarantee that a child will be loved, nurtured, and supported. However, when economic disadvantage, coupled with other factors, seriously impairs a parent's ability to support him or herself and his or her children, the Department may be required to step in to prevent the children from being victimized by neglect.

*In re Z.J.S.*, 2003 WL 21266854, at \*15.

Here, as in *In re Z.J.S.*, we believe that conditions exist outside Mother's economic disadvantage which would likely subject the children to further neglect if returned to Mother's care. Personnel from Homemaker Services testified that Mother had difficulty following through with



tasks, that she was untruthful on multiple occasions, and that she failed to complete any of the goals set out for her. These simple goals were directly related to the care of the children, including keeping the home clean and organized, budgeting, and parenting skills. Workers from Therapeutic Visitation Services also testified that Mother was inconsistent and untruthful, exercised poor judgment, and missed scheduled visits with the children. Finally, Dr. Pestrak testified that according to Mother's psychological evaluation, Mother was easily overwhelmed by stress, personal responsibility, and challenges in her life. Dr. Pestrak further found that Mother's needs tended to come before other's needs, including the needs of her children. Finally, Dr. Pestrak surmised that Mother's personal characteristics would result in the continued neglect of the children.

We also find that the State showed by clear and convincing evidence that there is little likelihood that these persistent conditions will be remedied at an early date so that the children can be safely returned to Mother. There was abundant evidence that the State took every effort to teach Mother parenting and household skills and to aid her in securing permanent housing and employment. The trial court made the specific finding of facts in its August 3, 2005, order:

- [T]he Court salutes the efforts of the subsequent case manager, Jennifer Maulden, who was assigned the case upon Ms. Gould's departure on January 1, 2004. Ms. Maulden was professional and made every effort to help Defendant Mother achieve reunification to the best of Ms. Maulden's ability.
- The Court further recognizes that the contract agencies in this case, specifically Residential Services, Inc. (RSI), went far beyond the usual time limit they are able to stay on a case and made extraordinary efforts to help the Defendant Mother.
- The Court finds that Defendant [Mother] did try, but despite her efforts she would make two steps forward toward achieving the return of her children, followed by three steps back. The Court does not make the finding that the Defendant Mother abused or neglected the children intentionally, nor does she lack the love or desire to care for the children. Rather, the bulk of the testimony indicates that this mother was simply overwhelmed and unable to adequately care for the children.
- The Court finds that the tasks set out for Defendant [Mother] on the children's plans of care were not that difficult - essentially, she was asked to simply provide for the very basic needs of the children. The tasks on the plan were reasonably related to the reason the children came into state's custody - their parents' homelessness and inability to provide for them.
- The Department and its agencies made reasonable efforts to assist the Defendant Mother in achieving the goal of reunification, but despite the services offered, Defendant [Mother] could not consistently keep stable housing or a job. The Court finds that perhaps this mother did not have the same ability to maintain a job that most individuals have, but that she did try.

Because Mother failed to remedy the persistent conditions listed in the permanency plans during the twenty (20) months the children have been in custody, even with the aid of DCS and its agencies, it is unlikely that such conditions will be remedied at an early date.

Finally, we find that there was clear and convincing evidence presented by the State that continuation of Mother's relationship with the children greatly diminished the children's chances of integration into a safe, stable and permanent home. The children have been living with a foster family, the Pattons, since they entered DCS custody almost two (2) years ago. There was evidence presented that the children appear to be thriving in this environment. Furthermore, the Pattons have indicated an interest in possibly adopting all five children if the Court affirms the termination of Mother's parental rights.

### **V. Best Interests of the Children**

Despite the existence of persistent unremedied conditions, the Court must also find that the State showed that parental termination is in the best interest of the children by clear and convincing evidence. Tennessee Code Annotated, section 36-1-113(c). In determining whether termination of parental or guardianship rights is in the best interest of the children, the trial court must consider the following factors:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use

of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5- 101.

Tennessee Code Annotated, section 36-1-113(I). However, every factor need not be satisfied in order for a court to decide that termination is in the best interests of the children. *State of TN Dept. of Children's Svcs. v. T.S.W.*, 2002 WL 970434, No. M2001-01735-COA-R3-CV, at \*3 (Tenn.Ct.App. May 10, 2002).

In determining that termination was in the best interests of the children, the trial court stated in its August 3, 2005, order:

With regard to the Defendant Mother, [B.C.], the Court relies heavily on the testimony of the state's expert witness, Dr. Victor Pestrak, and finds that it is very unlikely that the Defendant Mother will be able to complete her plan anytime in the near future or ever, even if given more time. That is, she is unable to provide a proper home for the children and incapable of providing for their basic needs, let alone the special needs of these children. It must, therefore, be in the children's best interest that they be freed for adoption and achieve permanency.

This Court would also note that Mother has failed to satisfy most of the other factors listed in Tennessee Code Annotated, section 36-1-113(i). First, Mother failed to make a lasting adjustment of circumstance to make it safe for the children to return home even after the extraordinary efforts made by DCS and other social services organizations. Although Mother has exercised fairly consistent visitation with the children, the record does not reveal that any of the children except S.C. have developed a meaningful relationship with Mother. In addition, two of the children's counselors testified that a change in residence would heighten the children's anxiety regarding their future and would be very emotionally difficult on them. Mother has a history of living with individuals who are inappropriate for the children to be around either because of criminal activity or substance abuse and those decisions contribute to an unsafe environment for the children. Furthermore, Dr. Pestrak testified that Mother's emotional immaturity and dependency make it unlikely that she would be able to change and eventually care for the children.

## **VI. Conclusion**

All termination of parental rights cases involve fundamental rights of a parent and the fundamental rights and interests of a child. This case is particularly difficult because it involves five

children and a single parent who loves her children, is not a substance abuser and would not deliberately harm her children. DCS has done everything within its power and control to facilitate reunification of the family. These efforts have not been successful. Clear and convincing evidence establishes that existing conditions cannot be remedied. At some point, the future of the children must take precedence over other considerations that the persistence of unremedied conditions and the best interests of the children mandate termination of the paternal rights of the mother.

The judgment of the trial court is reversed as to abandonment, but affirmed as to persistence of conditions and the best interest of the children. Costs of the case are assessed to Appellant.

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WILLIAM B. CAIN, JUDGE